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AUG 15 1994

Mr. William F. Caton
Acting Secretary
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1919 M Street, N.W.
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Dear Mr. Caton:

A copy of the attached "Summary of Opening Comments Regarding Attribution of Non-Equity Interests (GN Docket No. 93-252)" was served on several members of the Commission staff yesterday, pursuant to Section 1.1206(a)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(1). A list of the members of the Commission staff upon whom the document was served was meant to accompany the ex parte filing. The list was, however, inadvertently forgotten. Attached please find that list.

If you have any questions, please do not hesitate to call me at (202) 828-4452.

Respectfully submitted,

Karen Kincaid

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SUMMARY OF OPENING COMMENTS

REGARDING ATTRIBUTION OF NON-EQUITY INTERESTS

(GN DOCKET NO. 93-252)

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FOREWORD

On July 20, 1994, the FCC released a *Second Further Notice of Proposed Rule Making* soliciting commenters' views as to whether competition in the commercial mobile radio service ("CMRS") marketplace would be furthered if certain non-equity arrangements are treated as attributable interests for purposes of applying the 40 MHz limit on the accumulation of PCS spectrum, the PCS-cellular cross-ownership rules, or any more general CMRS spectrum aggregation cap.[1] The specific non-equity arrangements discussed by the FCC for this purpose include management agreements, resale agreements, and joint marketing agreements. The initial comments responding to the *Second Further Notice of Proposed Rule Making* were filed on August 9, 1994, and are summarized in brief herein.

We have done our best to represent each commenter's position accurately on a range of issues within two pages. Due to space and time constraints, however, many of the arguments have been truncated and rephrased. As such, in all cases, it is highly advisable to review the actual commenter's text. All summaries have page references to the actual commenter's text.

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[1] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 94-191 (July 20, 1994).

American Mobile Satellite Corporation (AMSC)

- Resale agreements, joint marketing agreements, or similar arrangements entered into by MSS providers should not be included for purposes of calculating a CMRS spectrum cap. MSS is a new service, and its successful development depends on there being no restrictions on its distribution. (1-2)

- AMSC has entered into resale and marketing arrangements with approximately 160 companies, including 155 cellular licensees, who will serve as agents for AMSC's enhanced roaming service. Marketing of AMSC services is not a large part of the cellular carrier agents' business -- as such, AMSC is concerned that, if the FCC attributes MSS spectrum to cellular carriers, they may not market MSS if doing so might risk their ability to acquire wireless spectrum such as PCS. (2-3)

- AMSC agrees with the FCC that resale agreements should not be attributable because the reseller cannot exercise effective control over the spectrum on which it provides service or reduce the amount of service provided over that spectrum. (3)

- The high cost and risk associated with the construction and launch of an MSS system make it imperative that a regulatory structure be in place that encourages distribution of the new service. (3-4)

Cellular Service, Inc. (CSI)

- CSI has a certificate of public convenience from the California PUC to provide cellular resale, and eventually plans to bid on a PCS license. These plans will be needlessly frustrated if CSI's resale activities are made attributable. (1)

- In addition, CSI does not believe that there is any public interest basis to justify a policy that would make cellular resale an attributable interest in applying the PCS spectrum aggregation cap, and maintains that such action will not help serve the concerns identified by the Commission. (1-2)

- By its very nature, cellular resale is dependent on the management and pricing decisions of other parties -- namely the licensed cellular carriers. A cellular reseller has no power to dictate the services that a licensed cellular carrier will provide or the applicable prices. The most that a reseller can do is purchase the services at wholesale rates and make them available to the public. (2)

- Thus, a cellular reseller's involvement in a separate PCS entity will not affect the services that the licensed cellular carrier offers or the prices thereof. (2)

The Cellular Telecommunications Industry Association (CTIA)

- Strongly urges the Commission not to treat management agreements, resale agreements, joint marketing agreements, and similar non-equity arrangements as attributable interests for purposes of applying the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, or any CMRS spectrum cap. The inclusion of such interests as attributable would delay the licensing of broadband PCS services, and thereby hamper the rapid deployment of PCS to consumers. (3)

- Expanding attributable interests to include the above would frustrate PCS licensees' ability to attract needed expertise and capital, and would create additional and unnecessary regulatory burdens for the Commission and broadband PCS bidders. (3-4)

- Under pre-auction application procedures for broadband PCS, applicants for the entrepreneurs' blocks must certify their eligibility to bid on and win licenses in those blocks. This requires compliance with the PCS-cellular and PCS-PCS cross-ownership limits. Including non-equity arrangements within the scope of the already restrictive attribution rules will increase the complexity and prolong the bidders' qualification process. (4)

- The various PCS rules are more than sufficient to ensure that the public will receive the full benefits of a competitive market; including non-equity arrangements into the broadband PCS attribution rules would only risk delaying the introduction of service. (6-7)

- With regard to management agreements, it is unclear to CTIA why the FCC would seek to restrict the access of broadband PCS licensees to the very firms who possess the greatest experience in providing wireless communications services -- especially in the case of designated entities, who stand to gain the most from management agreements. (8)

- The Commission's existing precedent already considers any agreement that confers *de facto* control on a party to be an attributable interest. This is more than sufficient to satisfy the Commission's legitimate public interest needs. (8)

- A PCS licensee would have no reason to enter into an agreement that is contrary to its best interest or causes it to restrain its competitive zeal. Thus, there is no basis for restricting PCS licensees from entering into management agreements. (8-9)

- Joint marketing may be beneficial to both licensees and consumers. Existing antitrust enforcement authority, which permits the government or an aggrieved person to commence an action, and the Commission's own authority over licensees' conduct are sufficient to allay any residual concerns that a specific agreement might have an anticompetitive effect. (9-10)

Columbia PCS, Inc. (Columbia)

- Urges the Commission to allow bona fide subcontractor-type management contracts, but not relationships that are tantamount to a general contractor role and thereby result in a transfer of *de facto* control. (3)

- Specifically, the Commission should narrowly define permissible management contracts to include contracts for any specific function (i.e., construction) that would conform to a practicable definition of a "subcontracting arrangement." The Commission should disallow any general management/general contractor strategy or planning functions to be outsourced by the licensee as constituting an improper transfer of *de facto* control. (3-4)

- In addition, the Commission should require such subcontracts to be priced at fair market value resulting from arm's length negotiations -- to prevent the subcontractor from extracting value from the licensee through the subcontracting arrangement. (4)

- Although the FCC should allow such subcontracting arrangements, they should be considered attributable interests for purposes of the PCS-cellular cross-ownership and PCS spectrum aggregation limits. (4)

- Absent attribution rules to this effect, there will be no prohibition on a BOC or cellular company that holds a 30 MHz or 10 MHz PCS license in its existing service area from providing management services to competing entities in the same market. Such a result would contravene the competitive objectives of Congress and the Commission, and create opportunities for designated entity shams. (5)

- The proposed attribution rules should apply to designated entities and nondesignated entities alike. (5)

- Broadband PCS auctions create significant potential for fronts or sham organizations for both designated entities and other applicants. Because the FCC does not have the resources to police every application and the operations of each entity, the Commission should require disclosure of such arrangements in the form of an audited report form a third party certifying that the contract meets the proposed definition of subcontracting. (6)

- Columbia does not oppose non-attribution of resale arrangements, provided that the arrangements are entered into after auctions and there is no contractual tie to the revenue, profits, or equity of designated entities. (6)

- In addition, the Commission should establish some limit on the amount of capacity available to a single reseller. In particular, an entity otherwise ineligible to obtain additional spectrum in a market should not be allowed to obtain an exclusive "capacity" arrangement, whereby it has the right to purchase all excess capacity from a licensee. (7)

- The details of the underlying relationships of the parties must be understood to address the concerns associated with joint marketing arrangements. Columbia believes that these arrangements should be scrutinized under general antitrust guidelines, and that sales/marketing arrangements should be required to be reached through arm's length negotiations, priced at fair market value and with no attachment to the revenue, profit, and/or equity of the licensee. (7)

GTE Service Corporation (GTE)

- GTE reiterates its previously stated opposition to the Commission's earlier proposal to adopt an across-the-board CMRS spectrum cap. (3-5)

- Both the CMRS spectrum cap proposal and the proposal to treat non-equity arrangements as attributable interests in applying spectrum aggregation limits appear to be based on the presumption that licensees, applicants, and their affiliates are inclined toward anticompetitive behavior. This assumption should be reversed to start with the premise that an entity is innocent and will act in a manner consistent with regulatory policies until the contrary is shown. (5)

- Existing antitrust laws and other safeguards more adequately address the Commission's concerns. (5)

- The treatment of management agreements as attributable interests is equally inappropriate in the context of the PCS spectrum aggregation limit, the PCS-cellular cross-ownership rules, or any more broad CMRS spectrum aggregation cap. (6)

- The Commission's proposal overlooks the fact that management agreements are likely to play a critical role in ensuring the successful launch of PCS and other services offered by designated entities. (6)

- Certain statements in the *Second Further Notice* appear to assume that licensees that use management services are either unable or unwilling to take appropriate steps to ensure that a management company in their employ will not engage in anticompetitive conduct or activity constituting a breach of the manager's fiduciary duties. Similarly, the *Second Further Notice* reflects a perception that entities providing management services will knowingly expose themselves to charges of conflict of interest and breach of duty. Parties that violate laws that govern such conduct should be confronted through the enforcement of antitrust laws and state fiduciary requirements. (7)

- Management agreements vary widely -- rather than treating all managements as attributable interests, the Commission should address its concerns through the use of its licensing authority. (7)

- GTE agrees with the Commission's tentative determination not to include resale agreements as attributable interests under any type of spectrum aggregation caps. (8-9)

- In GTE's experience, joint marketing agreements are useful because they result in savings and promote competition among service providers. Because each licensee that participates in a joint marketing agreement always remains in control of its facility, it is unlikely that such an arrangement would allow competitors access to information that could be used for anticompetitive purposes. (10)

- In addition, in GTE's experience, joint marketing-type arrangements can be structured so as to avoid the sharing of information between competitors, thereby obviating the Commission's concerns without the need for a general attribution rule. (10)

- MobiLink is an example of an alliance that provides benefits to consumers and licensees without creating opportunities for anticompetitive abuses. (10 n. 18)

LCC, L.L.C. (LCC)

- LCC's staff of in-house engineers works with CMRS operators to help them design, expand, and optimize their wireless mobile communications networks. In addition, LCC has developed an integrated range of proprietary software products that facilitate the design and operation of CMRS systems, and sells a variety of test equipment products designed to meet a CMRS operator's need to verify actual system performance. (2-3)

- LCC believes that, in order to best meet the needs of the marketplace and to fulfill the statutory mandate to provide full broadband PCS opportunities to designated entities, the types of arrangements described in the *Second Further Notice* should not be deemed as attributable interests. (4)

- A principal aim in the broadband PCS context has been to promote vigorous competition in the CMRS industry so that reasonably priced wireless communications services are made available to the public. Treating the arrangements described in the *Second Further Notice* as non-attributable interests will further this goal by enhancing competition among licensees and third parties that offer products, services, and expertise to licensees. (5)

- This is especially true of designated entities, which, to compete effectively, require the broadest possible access to the expertise and resources of third parties. (6)

- Moreover, the possible problems cited in the *Second Further Notice* are unlikely and do not outweigh the benefits of affording designated entities a competitive opportunity in broadband PCS. (7)

- Even if the Commission disagrees with the arguments presented above, it should confirm that the provision of the types of technical products and services supplied by LCC would not in any event be deemed to be attributable interests for purposes of applying the PCS spectrum aggregation limit, the PCS-cellular cross-ownership rules, any general CMRS spectrum cap, or the designated entity provisions. (8)

- The services, software, and hardware provided by LCC are purely technical in nature, and do not involve a CMRS operator's relinquishment of control over or responsibility for its licensed facilities. (8-9)

McCaw Cellular Communications, Inc. (McCaw)

- Within the limitations of the *Intermountain* criteria, there is no valid public policy reason for considering management agreements that meet the test as triggering special contrary treatment in the PCS context. The Commission has already determined that appropriately drawn management agreements constitute arm's length transactions, and there is no reason to believe additional safeguards are needed. (3)

- Similarly, there is no basis for different treatment of PCS resale agreements. To hold otherwise would have the negative effect of discouraging service providers from entering into such agreements without any corresponding benefit since there is no concern that a reseller could exercise effective control over the spectrum it uses. (4)

- In light of the Commission's prior determinations regarding the permissibility of joint marketing agreements in the broadcast context, there is no justifications for singling these agreements out for contrary, adverse treatment. (5)

Motorola Inc. (Motorola)

- In view of the overwhelming opposition in the record, Motorola reiterates its request that the Commission forego its proposal to adopt an overall CMRS spectrum aggregation limit. (3-4)

- It is neither necessary nor appropriate to treat management agreements as attributable interests for the purpose of imposing any spectrum aggregation cap. (5)

- The proposal in the *Second Further Notice* fails to take into account several considerations that dictate against treating management agreements as attributable interests:

  - First, by definition, a manager cannot exercise control over the licensee's facilities -- the Commission's rules and policies require that a licensee must, at all times, remain in control of and responsible for its operations. (5)

  - Second, sufficient legal mechanisms (i.e., antitrust laws and regulations governing fiduciary duties) exist to address any anticompetitive conduct that by be perpetrated by a manager who abuses access to sensitive business information. (6)

  - Third, because management agreements are the product of individual negotiations, they come in a variety of permutations, each with a separate delineation of powers and responsibilities. Any blanket rule attributing managed spectrum to a manager will be overbroad. (6)

  - Fourth, in Motorola's experience (i.e., in the 800 and 900 MHz SMR context), management agreements have served to increase competition and diversity in the mobile services marketplace by providing a source of consultation, advice, and expertise to inexperienced licensees. They are likely to provide the same services to designated entities. (6-7)

  - Fifth, in discouraging the use of management agreements for the reasons stated in the *Second Further Notice,* the Commission has failed to take into account the business experience and talent of licensees. (8)

  - Finally, the *Second Further Notice* overlooks the role that competitive bidding is likely to play in diminishing the potential for licensees to over-delegate to managers. (8)

- Motorola agrees with the Commission's tentative conclusion that the attribution of resale agreements for the purpose of applying spectrum caps is unnecessary and unwarranted because resale activities do not raise anticompetitive concerns. (9)

- Motorola opposes treating joint marketing agreements as attributable for purposes of any spectrum cap. Joint marketing mechanisms serve the public interest by enhancing the competitive viability of small service providers and by reducing the operating expenses of participating licensees. The adoption of regulations discouraging their use would deprive consumers of these benefits without serving any demonstrable purpose. (11)

National Cellular Resellers Association (NCRA)

- NCRA strongly supports the Commission's tentative conclusion that resale arrangements should not be treated as attributable interests for purposes of the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, or any overall CMRS spectrum cap. (3)

- Attribution of resale activity would be detrimental to the public interest because resale furthers interbrand competition, service availability, and the efficient allocation of spectrum resources. (3)

- In an environment of unrestricted resale activity, there is no reason to attribute the spectrum to the reseller because the reseller is not engaged in exclusive control of the spectrum and no other potential reseller is excluded from entering the market under similar terms and conditions. (3)

- Attribution of an underlying carrier's spectrum to a reseller would undermine the recognized benefits of resale activity. Many cellular resellers resell the services of both cellular licensees in their market. Because cellular carriers currently control 25 MHz of spectrum in their license area, attribution of the spectrum to a reseller may preclude cellular resellers from reselling the services of more than one cellular licensee, and would substantially curtail the ability of any reseller to enhance customer choice through the competitive offering of several CMRS services. (5)

- The Commission has separately raised the issue of whether it should prohibit resale restrictions throughout all classes of CMRS. In NCRA's view, a general prohibition on resale restrictions is legally and statutorily required, necessary, and in the public interest. (6)

- Absent a uniform CMRS prohibition on resale restrictions, the underlying policy objectives of spectrum caps can be easily circumvented. For example, facilities-based cellular carriers could enter into exclusive resale agreements with one or more PCS or other CMRS providers, effectively reducing competition and locking other carriers and non-facilities-based resellers out of similar resale arrangements. (7)

Nextel Communications, Inc. (Nextel)

- Nextel opposes the attribution of any non-equity interests for purposes of measuring the cumulative spectrum acquired by any entity. (1)

- Management agreements are allowed in the SMR context provided that the licensee retains overall supervision and control over the station and has a proprietary interest therein. Treating these interests differently, even if the manager does not have *de facto* or *de jure* control, would create inconsistency in the Commission's policies, and would unfairly attribute spectrum to parties whom the Commission has already determined have no ownership or control over the spectrum. (3-4)

- Nextel agrees with the Commission that resale contracts do not create the potential for a reseller to exercises control over the licensee's spectrum. Therefore, no attribution is justified. (4)

NYNEX Corporation (NYNEX)

- NYNEX recommends that, as long as management agreements, resale agreements, and joint marketing agreements do not confer on a party other than the licensee de facto control, such arrangements should not be treated as attributable interests in applying the PCS spectrum aggregation cap, the PCS-cellular cross-ownership rules, or a general CMRS spectrum cap. (2)

- These agreements may enable carriers, particularly designated entities, to operate their businesses more efficiently. (2)

- NYNEX does not believe these arrangements necessarily harm competition because they can be structured to ensure that competitive information is not improperly used by the managing entity. (2-3)

Pacific Bell Mobile Services

- None of the arrangements identified by the Commission poses a threat to competition, and none should be treated as an attributable interest. (2)

- Agrees with the Commission's tentative conclusion that resale agreements should not be considered attributable interests. Moreover, resale increases competition in the marketplace. (2-3)

- The fact that a cellular reseller may acquire spectrum for PCS will not have a negative impact on competition because the reseller has no control over the cellular spectrum. (3)

- Management agreements that do not rise to a level of *de facto* control do not pose a threat to competition. The entity providing the management assistance has no control over the license, and operates solely at the licensee's discretion. Moreover, management agreements are limited in duration and may not have any relationship to the term of the license. Thus, the ability to impede competition would be limited by the nature of the relationship. (4)

- PCS licenses are going to require a significant investment. Thus, it is unlikely that a management company would be given the opportunity to impede investment. (4-5)

- If management agreements are treated as attributable, competition will suffer because the expertise of experienced operators will no longer be available to less experienced licensees. (5)

- The Commission should not get involved in the micromanagement of business. Defining what constitutes a management agreement would be an administrative nightmare and would consume the resources of management companies and the Commission. (6)

- In view of the competitive nature of the CMRS marketplace, there is no need to create a complex set of rules surrounding management agreements. (7)

- Agrees with the Commission that joint marketing agreements benefit consumers. Further, in view of the competitive nature of the CMRS marketplace, competition should not be impaired by the use of these arrangements, which may in fact enhance competition. (8)

- Because none of the non-equity arrangements identified in the *Second Further Notice* should be attributable, there is no need for special rules relating to designated entities. (9)

PCC Management Corp. (PCC)

- Before the Commission can apply any spectrum cap to management agreements, it must define which management agreements comply with the *Intermountain* criteria in light of today's environment, which is radically different from that at the time the decision was issued. (2)

- Because of the changes in communications businesses, a licensee's proper level of involvement in running its business has changed. Licensee principals cannot have the same hands-on involvement they did a decade ago. Rather, they must either develop an in-house staff, retain third-party managers, or use a combination thereof. (3)

- The Commission should be mindful that third-party managers are an essential component of today's communications environment, and should adopt control and real party in interest criteria that are consistent with existing business practices. (3)

- Control and real party in interest considerations arise in four different contexts: pre-grant (applicant) vs. post-grant (licensee), and pursuant to a formal agreement or not. These four situations raise different policy concerns, and should be given different levels of scrutiny. (4)

- Written agreements provide less opportunity for a violation of the Commission's Rules and require less scrutiny; the opportunity for a violation of the rules is greater during the pre-grant stages than post-grant. Thus a higher level of scrutiny is required at this time. The Commission should clearly explain these distinctions and adjust *Intermountain* to the specific facts of each context. (5-6)

- The Commission should take steps to minimize the occurrence of *Intermountain* issues in the future. PCC believes that the description of certain mandatory provisions (set forth on pages 7-8) would provide a safe harbor for management agreements to be in full compliance with the Commission's rules, thereby stabilizing the regulatory environment surrounding such arrangements and avoiding litigation. (7-8)

- Management agreements should not be applied to non-PCS, non-CMRS spectrum aggregation limits, such as the 800 MHz SMR 40-mile rule. PCC has entered into management agreements in the 800 MHz SMR industry based on the Commission's current practices. A retroactive reversal of the agency's policies toward such arrangements would injure numerous licensees that relied on the agency's existing policies. (9)

PlusCom, Inc. (PlusCom)

- PlusCom urges the FCC not to expand the class of attributable non-equity interests to include small businesses, businesses owned by women, businesses owned by minorities, and rural telephone companies (i.e., designated entities). (1)

- The nascent CMRS industry is not the proper forum for expanding attribution of ownership criteria beyond the *Intermountain* test. Such an expansion would place undue restrictions on designated entities' ability to creatively obtain financial assistance. (2)

- All non-equity relationships that pass muster under *Intermountain* should be treated as non-attributable for designated entities. (2-3)

- By taking advantage of the brand name of a larger entity, joint marketing agreements will greatly enhance the ability of designated entities to compete in the CMRS marketplace without undermining the integrity of the designated entity. Accordingly, the FCC should conclude that joint marketing arrangements do not constitute an attributable for spectrum cap purposes or for purposes of designated entity status. (3)

- The Commission should also clarify that equipment leasing agreements arising from arm's length transactions are not attributable for any purpose, even if the lessor happens to be one or more nonattributable investors in the licensee. (4)

The Rural Cellular Association (RCA)

- It is unnecessary for the Commission to adopt attribution rules for entities that have non-equity relationships with the licensee. The Commission's current rules prohibit such entities from exercising control over the licensee, and violation of these rules subjects the licensee to severe sanctions. In addition, anticompetitive collusion is prohibited by antitrust laws. (6)

- The Commission's concerns regarding a manager's misuse of information are misplaced, and are unlikely to occur absent manager deception or licensee incompetence. (6)

- The risk of losing a high cost license secured through the auction process through the violation of current transfer of control rules will suffice to prevent designated entities from transferring *de facto* control to managers. (7)

- RCA agrees with the Commission's analysis concerning resale agreements, and sees no reason to attribute the spectrum of the underlying licensee to such entities. (7)

- With regard to joint marketing agreements, RCA cautions the Commission not to create problems where they do not exist. Joint marketing and licensing agreements such as Cellular One and MobiLink do not act as impediments to vigorous competition. Rather, competition is robust due to these competing market forces. (8)

- Broadcast law provides no support for the attribution of joint marketing agreements to CMRS providers because concerns surrounding program diversity and content do not exist in the CMRS context. (8-9)

- In the event that the Commission determines that it is in the public interest to attribute non-equity arrangements to CMRS licensees, rural telephone companies should be exempt. (9)

- The Commission's positive experience with the rapid and efficient provision of rural cellular radio service by rural telephone companies attests to the validity of awarding special consideration. (9)

- To the extent that the proposed attribution rules produce any public interest benefit, it is outweighed by the detriment that would result from the application of the restrictions to rural telephone companies by restricting the provision of service to rural America. (9-10)